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No. 07-806

In the Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY AND R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

RONALD ACCORD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause bars a bifurcated trial plan, whereby the first phase of the trial determines the liability issues common to all defendants, entitlement to punitive damages and a punitive damages multiplier and the second phase of the trial determines individual issues and the compensatory and punitive awards.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

The courts of West Virginia have adopted a consolidated approach to the adjudication of torts in cases involving defendants whose products and actions have harmed many. In the present case, the Defendants knowingly sold defective cigarettes to West Virginia smokers who subsequently developed smoking-related diseases. During the operative period of this lawsuit, the Defendants entered into and maintained a conspiracy involving common tortious conduct directed against the Plaintiffs. For example, the Defendants agreed not to market a truly safer cigarette and not to perform animal research on their premises. The Defendants also uniformly claimed that their particular brand of cigarettes was safer in an effort to "reassure" addicted smokers to continue smoking, despite their knowledge that these allegedly "safer" cigarettes were actually more dangerous than traditional cigarettes. The Defendants commonly understood that cigarettes were addictive and manipulated the delivery of the addictive drug, nicotine, in their cigarettes to make them more addictive. The list of the Defendants' common tortious conduct is voluminous and fills millions of pages of their own internal documents. Each Plaintiff involved in this case claims injury caused by the same product, cigarettes, and the

common conduct of the Defendants.[1] In short, the products, conduct and subsequent harm at issue in Phase I are similar and apply equally to all Defendants and all Plaintiffs.[2]

If the more than 1,000 individual cases involved in this action were treated in the traditional course of litigation, the West Virginia court system would need to devote at least 180 judge years to these trials. Many, if not most, of the Plaintiffs would die before their individual case was tried, thus affording the Defendants a free pass for the majority of their tortious conduct.[3] This approach would ensure that

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[1] The Phase II jury will have the ability to find against any plaintiff who does not fit within the framework of the "common liability" in the Phase I jury's verdict. The Phase II jury and reviewing judge will also have the ability (and duty) to award no punitive damages, ratchet the punitive damages award up or down, or even overturn the Phase II jury's individual damages verdicts, based on the individual facts of each case. The myriad of future contingencies argue against this Court's involvement in Phase I of this trial. *See* Section I, *infra*.

[2] Petitioners' Writ discusses "twenty other Defendants", but fails to inform this Court that all non-cigarette claims and parties were long ago severed from these proceedings by the state court.

[3] The Defendants convinced the trial court to dismiss with prejudice all claims of any Plaintiff that died during the pendency of this case without a deposition. More than 263 Plaintiffs were dismissed with prejudice as a result of this ruling. Although the trial court later reinstated these Plaintiffs, it designated their claims as "encumbered" and allowed the Defendants to perform extensive individual discovery on these claims, including 688 depositions, blanket medical authoriza-

the worst offenders in our society could escape liability because of the magnitude of the harm caused by their conduct and would deprive individual plaintiffs of the most sacred of all due process rights — their lives.

Phase I of this trial is scheduled to begin on March 18, 2008. In that proceeding, the jury will determine the "[g]eneral liability issues common to all defendants" and "entitlement to punitive damages." January 11, 2000 Case Management Order/Trial Plan, Petitioners' App. 70a-71a. If the Phase I jury determines that the Defendants' conduct merits punitive damages under existing West Virginia law, the same jury will determine a punitive damages multiplier. Petitioners' App. 71a. A different jury will later apply this multiplier to all Plaintiffs who recover compensatory damages in Phase II.[4] Petitioners' App. 71a. Therefore, the Phase I jury will have no ability to punish or deter any Defendant. This fact alone is determinative of

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tions and written discovery.

[4] Under West Virginia law, the trial court and appellate court must review every punitive award with an eye to the reasonableness of that award. *See* Syl. Pts. 4 and 5, *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991). The trial court maintains discretion to adjust the punitive award up or down depending on the individual circumstances of each case. *Id.* at Syl. Pt. 4 ("Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur . . . .").

Petitioners' due process complaint, since the Phase I jury will have no ability to deprive the Petitioners of any property. *See Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1059 (2007) ("Thus, the Constitution imposes limits on both the procedures for *awarding* punitive damages and *amounts* forbidden as 'grossly excessive'") (emphasis added). As a result, the issue of whether individual issues will be tried in Phase I is irrelevant to a due process inquiry.[5]

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[5] Petitioners' claim that "almost no plaintiff-specific discovery has been permitted" is false. In fact, this case was recently continued for an entire year because the Petitioners insisted on their right to take 688 individual depositions of the family members of deceased Plaintiffs. 8/18/06 Hearing Trans. at 30-31. Defendants were also provided "baseline" information on every Plaintiff involved in this case more than 7 years ago, including: (1) the brands of cigarettes smoked and the duration for each brand; (2) the places where these cigarettes were purchased; (3) each Plaintiff's diagnoses, and; (4) each Plaintiff's address, phone number and social security number. In addition to this "baseline" information, the Defendants were provided extensive responses to interrogatory requests more than 7 years ago, including, but not limited to, each Plaintiff's: (1) medical history; (2) family history, including medical and marital history; (3) employment history; (4) education; (5) criminal history; (6) insurance coverage, and; (7) involvement in other litigation.

In 2001, the Plaintiffs also provided a detailed, 70-page explanation of their claims in this case in response to the Defendants' contention interrogatories. Plaintiffs have supplemented these responses twice. Based on this wealth of information, Defense counsel informed the state court that they were ready to try Phase I of this case in 2001:

MR. HEIM (LEAD COUNSEL FOR DEFENSE):

"I think we are pretty close to both sides understanding

1. On September 28, 1999, the Chief Justice of the Supreme Court of Appeals for West Virginia entered an administrative order consolidating all tobacco-related personal injury suits then pending in West Virginia and transferring them to the Circuit Court of Ohio County for coordinated proceedings. The initial claims were consolidated under West Virginia's mass-litigation procedure, Trial Court Rule 26.01, the relevant section of which defines "mass litigation" as "two (2) or more civil actions pending in one or more circuit courts . . . (b) involving common questions of law or fact in 'personal injury mass torts' allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implementation, ingestion,

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what it is that's going to be tried."

11/2/01 Hearing Trans. at 15-16.

Therefore, the Defendants in this case have been given an unprecedented opportunity to discover the individual circumstances of the Plaintiffs. Defendants will be allowed to use this information to defend against each Plaintiff's claims in Phase II, which will involve the "individual issues of the Plaintiffs." At that time, Defendants will have a full opportunity to present a complete defense based on the individual circumstances of each Plaintiff prior to the entry of a single penny in punitive damages. As a result, the issue of whether individual issues will be tried in Phase I is irrelevant to a due process inquiry, since the Phase I jury will have no ability to punish the Defendants, but only determine whether the Defendants are liable for punitive damages and subsequently determine a punitive multiplier.

or exposure . . . ." W.Va. Tr. Ct. R. 26.01.

More than 1,000 additional plaintiffs later joined the consolidated proceeding, all alleging injury from their use of tobacco products. The Plaintiffs filed responses to Defendants' discovery in March, 2000, informing Defendants of the specific injuries suffered by each Plaintiff. *See* Baseline Medical and Factual Information for the Plaintiffs on the September 6, 2000 Complaint. The initial injuries alleged by the Plaintiffs were narrowed in the course of discovery to 20 injuries commonly caused by cigarettes. The initial theories of liability were also narrowed or dismissed by Defendants' unrelenting defense of these claims. *See, e.g.*, Order Regarding September 14, 2006 Hearing (dismissing Plaintiffs' fraudulent concealment claims only 6 months before trial). In 2001, Defendants informed the state court that they "understood" the Plaintiffs' claims and implicated that they were prepared for the Phase I trial. November 2, 2001 Hearing Trans. at 15-16. The state court later severed all non-cigarette Defendants and issues from the Phase I trial. Stipulation and Order, dated December 3, 2001.

2. After entry of the current Trial Plan, the Defendants certified the same question now at issue in their writ of certiorari — namely, whether *State Farm v. Campbell* requires that "the defendant's conduct be tailored to each plaintiff (i.e., precludes evidence of harm to others)." West Virginia's high court answered the certified question in the negative, holding that "in application of [Campbell] to the instant case, it is the role of the circuit court to

ensure that the plaintiffs' evidence is relevant, reasonably related to the acts upon which liability is premised, and supports their claim for punitive damages. Therefore, we find nothing in the circuit court's original trial plan that prevents the admission of evidence that is proper under *Campbell*." *In re Tobacco Litigation*, 624 S.E.2d 738, 742 (W.Va. 2005), Petitioners' App. 39a.

3. On remand, the trial court emphasized repeatedly that its initial interpretation of *State Farm* was wrong — i.e., *State Farm* did not require that "the defendant's conduct must be tailored to each plaintiff." *See, e.g.*, September 18, 2007 Hearing Trans. at 28-29. ("[T]he Supreme Court didn't just send [the due process issue back] — they threw it back. In terms of being wrong, I was 100 percent wrong, according to them"). As a result, the trial court reinstated the Trial Plan and refused to act on the Defendants' multiple subsequent requests to vacate the Trial Plan, stating that "I feel stronger than ever that it is a proper plan." May 23, 2007 Hearing Trans. at 8, Petitioners' App. 24a.

4. On February 20, 2007, this Court issued its decision in *Philip Morris USA v. Williams*. This Court's decision was based, in part, on Philip Morris' submitted jury instruction and subsequent argument that evidence of harm to others is relevant to the determination of a punitive damages multiplier. 10/31/06 Hearing Trans. at 11:2-10, *Philip Morris USA v. Williams*, Oral Argument before the United States Supreme Court; *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1064 (2007) ("Philip Morris,

in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we"). At the same time Philip Morris was taking this position in *Williams*, it was taking a completely contrary position before the West Virginia courts — i.e., the use of harm to others evidence in the determination of a punitive damages multiplier is strictly forbidden by due process. *See* Defendants' Motion to Vacate the Trial Plan in Light of *Williams* at 19-20 ("In *Williams*, the United States Supreme Court rendered an unequivocal prohibition against the assessment of punitive damages based in any part on harm to others"). Despite Philip Morris' disingenuous assertions, the trial court again denied Petitioners' Motion to Vacate the Trial Plan on May 23, 2007 and reaffirmed its decision to proceed under the bifurcated trial plan. Petitioners' App. 24a.

5. Petitioners then filed a second petition for a writ of prohibition in the West Virginia Supreme Court, again arguing that this Court's decision in *Williams* bars the use of evidence of harm to others in the determination of a punitive damages multiplier. Emergency Petition for Writ of Prohibition at 14 ("Each Plaintiff would be entitled to [a] punitive damages [multiplier] based on evidence of conduct toward and harm sustained by other persons . . . ."). Defendants made this argument despite their knowledge that every Plaintiff in Phase I was harmed by the Defendants' defective cigarettes and common tortious conduct. The West Virginia Supreme Court denied the petition without comment on November 7, 2007, having already decided the issue against Defendants in 2005. Petitioners' App. 1a-2a.

REASONS FOR DENYING THE PETITION

Judge Arthur M. Recht is currently presiding over the largest consolidation of tobacco personal injury cases ever ordered by any court in the country. More than 1,000 Plaintiffs asserting the same claims based on 50 years of Tobacco Industry misconduct directed toward these West Virginia Plaintiffs and others have been joined together for trial.[6] Determining an efficient and just way to try more than 1,000 cases in a single court is critical to the proper resolution of these cases. A recent study concluded that the disposition of 1,000 similarly complex claims, if treated in the traditional course of litigation, would require approximately 150 judge years.[7] *See, e.g., State ex rel. Appalachian Power Co., et al. v. MacQueen*, 479 S.E.2d 300, 303-304 (W.Va. 1996) (*citing* Jack B. Weinstein, Individual Justice in Mass Tort Litigation 140 (1995)). Therefore, an inefficient trial plan would practically deny a

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[6] Petitioners claim there are only 735 Plaintiffs in this consolidated action. This discrepancy in the number of Plaintiffs is due to the Petitioners' successful requests to dismiss with prejudice all claims of any Plaintiff who dies before completing his/her deposition testimony. This request by the Petitioners and subsequent action by the state court is, of course, a real deprivation of due process and a blatant violation of the West Virginia Wrongful Death Act.

[7] The parties have estimated that each of these individual tobacco cases would take approximately 6 weeks to try. Even if the circuit court were able to set 6 individual tobacco cases per year (thereby consuming at least 80% of the court's docket), it would take more than 180 years to try all the currently pending cases.

substantial portion of these terminally-ill Plaintiffs their day in court.[8]

On January 11, 2000, Judge Recht adopted a bifurcated trial plan in which the initial trial phase would resolve "[g]eneral liability issues common to all defendants" and "entitlement to punitive damages." 1/11/00 Case Management Order/ Trial Plan ¶ 3(a), Petitioners' App. 70a-71a. The second phase of the trial would determine the "individual claims of the plaintiffs" and compensatory and punitive damages.[9] Petitioners' App. 71a. Under the current Trial Plan, no Defendant will be punished until the Phase II jury determines a punitive damages award (if any). As a result, the issue of punishment central to the

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[8] In fact, almost 300 Plaintiffs have already died during the 10-year pendency of this case.

[9] Defendants campaigned from the very beginning of this litigation for a trial plan that would try these cases individually. Their argument of choice was that the trial plan was "unconstitutional." For more than 4 years, Defendants filed a constant stream of briefs attacking the constitutionality of the court's bifurcated trial plan. The state court upheld the bifurcated plan under existing United States Supreme Court precedent, including *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) and *BMW, Inc. v. Gore*, 517 U.S. 559 (1996) and West Virginia Supreme Court precedent, including Syl. pt. 1, *Mayer v. Frobe*, 22 S.E. 58 (W.Va. 1895) and Syl. pt. 3, *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991). Defendants requested a certified question before the West Virginia Supreme Court twice over the last 2 years based on this Court's decisions in *State Farm* and *Williams*. Both requests were denied. Importantly, the West Virginia Supreme Court held on both occasions that the Trial Plan does not violate the Defendants' due process.

Petitioners' request for a writ is nothing more than a future contingency. This Court should not consider the Petitioners' analysis of the reasonableness of a hypothetical and wholly speculative punitive damages award.

In regard to the punitive damages multiplier that is at issue in Phase I, this Court recently held:

> [W]e recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.

Williams, 127 S.Ct. at 1065.

At the time *Williams* was decided, Philip Morris not only agreed with, but also strongly argued for this statement of the law:

> But ***as this Court has made quite clear***, the reprehensibility of the conduct is an important factor . . . So, more conduct that is calculated to harm large numbers of people can be found more blameworthy ***as to warrant a higher proportion, a higher relationship between the punitive and compensatory damages***.
>
> So there's a fundamental difference in that respect between considering and punishing for it, and the Court has said repeatedly [ ] that the character of the conduct can be considered in determining

> the proper level or allowable level of punitive damages . . . So I don't think it is proper to tell the jury that they may not consider the conduct without getting ourselves in serious trouble.

See, 10/31/06 Hearing Trans. at 11:2-10 and 12:10-21, *Philip Morris USA v. Williams*, Oral Argument before the United States Supreme Court (emphasis added).

In its current writ, Philip Morris seems to have forgotten its understanding of the difference between "punishing" and "considering."

I. A DECISION IN THIS CASE WOULD VIOLATE THIS COURT'S "DEEPLY ROOTED" DOCTRINE NOT TO PASS ON QUESTIONS OF CONSTITUTIONALITY UNLESS SUCH ADJUDICATION IS UNAVOIDABLE.

Defendants' writ is premised entirely on contingent future events that may not occur as anticipated or may never occur. The Phase I jury will have no ability to punish Defendants or award a single penny in punitive damages. This will be the sole province of the Phase II jury, who will hear evidence of the Plaintiffs' individual issues and Defendants' defenses to those individual issues and subsequently determine the compensatory and punitive damages awards. As a result, the Phase I jury will not have the ability to deprive the Defendants of any property and, therefore, the currently pending phase of this trial does not implicate due process. Of course, Phase II of this trial is at present wholly contingent on an affirmative decision of the Phase I jury regarding whether Defendants' conduct merits punitive damages. This

Court has never been in the business of deciding constitutional contingencies and should not involve itself in the review of theoretical punitive damages awards.

As this Court has consistently explained:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable. It has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions or to decide any constitutional question in advance of the necessity for its decision or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied or to decide any constitutional question except with reference to the particular facts to which it is to be applied. It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

See, e.g., Clinton v. Jones, 520 U.S. 681, 690 (1997) (collecting cases).

II. IN *WILLIAMS*, PHILIP MORRIS ADMITTED AND THIS COURT HELD THAT EVIDENCE OF HARM TO OTHERS IS RELEVANT TO THE DETERMINATION OF A PUNITIVE DAMAGES MULTIPLIER.

Throughout the proceedings before the West Virginia circuit court, Defendants have maintained that this Court's precedents in *State Farm* and *Williams* require that each plaintiff's claim for punitive damages must be based solely upon the conduct that harmed that particular plaintiff. *See* Defendants' Motion to Vacate the Trial Plan in Light of *Williams* at 19-20 ("In *Williams*, the United States Supreme Court rendered an unequivocal prohibition against the assessment of punitive damages based in any part on harm to others"). This nonsensical rule would allow a defendant who harms thousands to escape liability due to the strong preclusive effect on harm to others evidence. Punitive damages would then bear an inverse relationship to the magnitude of a defendant's harm.

Of course, this Court's due process precedent, most notably *Williams*, dispels such a senseless and unjust interpretation:

> We recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.

Philip Morris USA v. Williams, 127 S.Ct. 1057, 1065 (2007).

Philip Morris itself recognized the relevance of harm to others evidence in determining a punitive multiplier when it persuasively argued the following to this Court in *Williams*:

> But as this Court has made quite clear, the reprehensibility of the conduct is an important factor . . . So, more conduct that is calculated to harm large numbers of people can be found more blameworthy as to warrant a higher proportion, a higher relationship between the punitive and compensatory damages.

10/31/06 Hearing Trans. at 11:2-10, *Philip Morris USA v. Williams*, Oral Argument before the United States Supreme Court; *see also Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1064 (2007) ("Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we").

CONCLUSION

Unless this Court decides to reverse *Williams* and adopt Philip Morris' revised understanding of due process constraints on punitive damages, the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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